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Book Review: "Taking Law Seriously" A review of Reading Law: The Interpretation of Legal Texts, by Antonin Scalia and Bryan A. Garner

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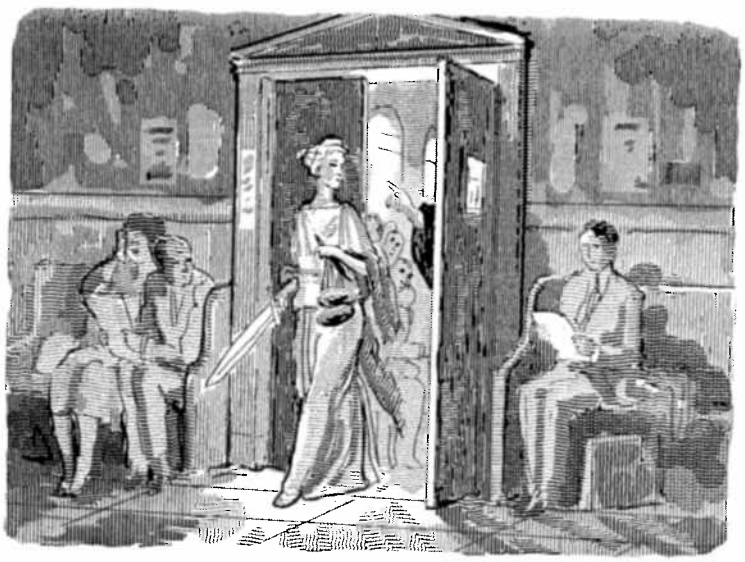
Taking Law Seriously

Reading Law: The Interpretation of Legal Texts, by Antonin Scalia and Bryan A. Garner. Thomas West, 608 pages, $49.95



A judge sitting on high, robed in black, and conducting the proceedings before him with gravity, stands for something. He marries two incongruities—humilty and authority—into one persona. He represents the rule of law. In *Reading Law*, Antonin Scalia, Associate Justice of the United States Supreme Court, and Bryan A. Garner, editor-in-chief of *Black's Law Dictionary*, incisively delineate one set of interpretive rules that ground the judge in humility. They less clearly demonstrate how these rules engender authority.

Judging takes place within a matrix of standards that both constrains the judge from imposing his personal will (hence the humility) and enables the judge to discern the true command of the law (hence the authority). That matrix of judicial standards is rich: it includes statutes, precedent, appellate structure, procedure, doctrine, ethics, legality, and reason (see my essay, "May It Please the Court," in the Fall 2011 *CRB*). Each of the elements of the matrix has its own imperative standards, some of them arcane. If properly educated to them, with an appropriate disposition, and with practice, the judge can develop a genuine virtue of judging, that is, the habit of acting rightly. Though Justice Scalia eschews asserting any form of morality as the basis of his decision-making, he in fact practices the morality of judging. He does so by the very rules that tie a judge to his craft.

In this prodigious work of scholarship, Scalia and Garner describe the interpretive rules that make up only one element of the moral matrix of judging. They subtitle it *The Interpretation of Legal Texts*, but they primarily mean statutes, and analogously, contracts and administrative regulations. Divided into 57 canons of interpretation (and ending with "Thirteen Falsities Exposed"), the book not only explains particular rules of interpretation in detail, it seeks to justify the authors' definition of each canon against opposing and outlier examples.

To illustrate the refinement of the authors' analysis, take, for example, the canon *ejusdem generis* (of the same kind). The problem is how to interpret a general phrase at the tail end of a list of specific examples. It is a complex interpretive task. For instance, if a statute covers "automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails," does the category of "self-propelled vehicle not designed for running on rails" include airplanes? In other words, does the list of "automobile, automobile truck," etc. limit the category of "self-propelled vehicle" to *similar* kinds of non-rail vehicles, thus excluding airplanes from its scope? Or, are automobiles, automobile trucks, and the others merely examples of the general category of all vehicles that are "not designed for running on rails," which would then include airplanes? One could conceivably accord the general phrase a freestanding validity that swallows up the preceding examples, but Scalia and Garner persuasively contend that the general category is limited by the nature of the previously stated examples. They do so with two arguments. One is that the nature of the specific necessarily defines the nature of the general at the end of the list as a matter of context and common usage (a "species-genus pattern," as they put it). The second argument is that to do otherwise would engender absurd results and make superfluous what had been careful legislative drafting. Therefore, the category in the example above would *not* include airplanes.

But that's not the end of it. The rule that the specific limits the range of the general requires at least *two* preceding examples to form a class that can define the range of the after-stated genus. The sole word "theaters" in

"theaters and other places of public entertainment" is not enough to constitute a particular class that would limit the meaning of "places of public entertainment." Rather, the phrase means *all* "places of public entertainment," "theaters" being merely an example.

The authors also admit that, at times, identifying the genus of the category can be troublesome. In a list of "LPs, CDs, DVDs, and other means of home entertainment," it is not clear what would constitute "other means of home entertainment." Sometimes, the preceding list of examples is so heterogeneous that no genus can properly be identified. In that case, the authors argue that the generic phrase at the end stands on its own and is unlimited by what went before. Similarly, if statutory language is reversed, if it begins with a general category and then follows it with specific examples, the authors would not limit the general category by the nature of what comes after, even though other scholars and other judges would.

The book's structure is coherent. After starting out with a series of articulated "Fundamental Principles," such as the "Presumption Against Ineffectiveness," the authors group the canons into similar types. Semantic canons, syntactic canons, and contextual canons are grammatical and particularistic. Other groupings are based on underlying principles that anchor the rule of law: expected-meaning canons, government-structuring canons, private-right canons, and stabilizing canons. Among the "Thirteen Falsities Exposed" they reject such canons as "The false notion that remedial statutes should be liberally construed."

Throughout, the work exhibits the arguments for which Justice Scalia has become well known. It is, first of all, a full-throated defense of textualism against its competitors, such as seeking legislative intent, or discerning the "spirit" of the law, or revising the law to fulfill its "purpose." The "Fixed Meaning Canon" repeats and expands Scalia's long-standing defense of originalism against all apparent alternatives: "It is the only objective standard of interpretation even competing for acceptance."

But what is the purpose of this thoroughly footnoted and annotated guide to interpretation? Why have such a detailed explication of interpretive methods except as a how-to book for lawyers and judges? The authors themselves disclaim any larger goal behind their work than to limit the judge from imposing his own policy preferences. They call false, for example, the "notion that the quest in statutory interpretation is to do justice." At most, they ground the legitimacy of their methods in preserving democracy, a distinctly post-1938 reason for limiting judicial discretion. "Originalism is the *only* approach to text that is compatible with democracy," they assert, though they compromise their position by accepting, under *stare decisis*, decisions that may not have been reached on the basis of originalism.

At times, Scalia and Garner come close to affirming a moral basis for a canon. In the "Rule of Lenity," which mandates that ambiguities in a criminal statute should be resolved in favor of the defendant, they speculate on the reason for the rule. They note that according to Chief Justice John Marshall, the rule is founded not just on the intention of keeping separate the respective roles of the legislature and the courts in defining punishments, but also "on the tenderness of the law for the rights of individuals." Yet they leave this justification hanging in mid-air, denying that lenity has any basis in the constitutional requirements of due process.

It is not that the authors wish to reduce the judge to a bureaucratic *apparatchik* slavishly following mechanical rules. On the contrary, they emphasize throughout the work that few canons are absolute, that in most cases, many differing canons apply, and that the task of interpretation calls for the judge to exercise reflection and deliberation in discerning what is the true import of the text before him. The book is a guide, not a roadmap. It is not a work of an unnuanced textualist.

Yet it is clear that the voice of Justice Scalia speaks throughout, criticizing judges who have imposed their personal preferences on the law and, through it, on us and on our constitutional system. In reaction, he is led to discount the moral content implicit in the task of judging itself. He prefers judges to be, in Alexander Hamilton's words, "bound down by strict rules and precedents."

For example, he and Garner dispute whether courts can impose the maxim that "no one can benefit from his own wrong" on a statute, even though the maxim stretches back centuries to Sir Edward Coke. The example they allude to is whether a son who murders his parents could nonetheless be entitled to his inheritance, when the positive law of the state provided for no exception for such parricidal self-interest. The New York courts added in the exception as an explicit limit on the state's intestacy statute. Illinois courts let their state's statute stand unmodified. Scalia and Garner agree with the Illinois courts' position and would affirm the sweep of the intestacy statute even against an obvious lacuna. They point out that all states now have statutes that cover the situation, which confirms their view that statutory errors should be cured by legislatures, not courts.

Fair enough. But the maxim "no man should profit from his own wrong," which is a corollary to "no man should be a judge in his own case," is an element of the rule of law itself, which can, in reason, suffer no absurdity or self-contradiction. It is contradictory for a judge who personifies legal neutrality to decide a case in which his interests are at stake. It is an absurdity for a regime of law that seeks to deter murder to embed an incentive to murder in its law.

These maxims are not moral rules drawn from some extrinsic standard and emplaced into the law by the judge's whim; they are implicit in the nature of what is law, the determination of which is, as Marshall insisted, the essence of the judicial enterprise. If the command of the positively enacted law defines all there is to law, then the maxim (also from Lord Coke) that "the law compels no man to impossible things" would also have no place. The irony of Scalia and Garner's position is that it disputes the historical provenance of judicial review itself, namely Coke's opinion in *Bonham's Case* (1610) in which a parliamentary enactment was struck down as offending the maxim that no man can be a judge in his own case.

Yet despite Scalia's protests against making decisions based on morality and his objections to some of Lord Coke's hoary maxims, he himself personifies another of Coke's norms: "*Nihim quod est contra rationem est licitem* [nothing is lawful which is contrary to reason]; for reason is the life of the law, nay the common law itself is nothing else but reason, gotten by long study, observation, and experience, and not of every man's natural reason." Hamilton had also stated in *The Federalist* that judges must engage in "long and laborious study to acquire a competent knowledge" of rules and precedents.

Although Justice Scalia possesses no humble personality, he asserts humility in judging. A man of high intellect and analytical clarity, he nonetheless evinces a suspicious attitude towards certain intrinsic and historical standards that guide a judge. Yet despite himself, his *Reading Law* remains nothing less than a plea to observe the moral constraints of judging and to observe the very rules that inform the nature of a judge's calling.

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